

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

77-1315

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 77-1315

UNITED STATES OF AMERICA,

Appellant,

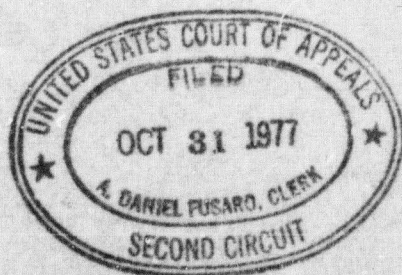
-against-

PAUL LABRIOLA and THOMAS CONTINO,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLEE
CONTINO



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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellant,

Docket No.
77-1315

-against-

PAUL LABRIOLA and TOM CONTINO,

Appellees.

APPELLEE'S BRIEF

Preliminary Statement

This brief is submitted on behalf of appellee Thomas Contino and in opposition to the appeal by the United States of America seeking to reverse the decision and order of the United States District Court for the Eastern District of New York by Judge Costantino dismissing the instant indictment.

It is submitted that Judge Costantino's decision, A33-36, should be affirmed in all respects. The Government's argument that this Court should hold the appeal pending a determination in the case of United States v. Mauro, 544 F.2d 588 (2d Cir. 1976), now before the Supreme Court, is without merit or legal authority. In addition the

Government now seeks to raise new argument in this Court, seeking to distinguish Mauro from the case of appellee Contino, arguments which were not raised in the District Court and are in fact contrary to the Government's own position at the time the District Court considered the matter.

Appellee therefore believes that the decision of Judge Costantino should be in all respects affirmed.

Statement of Facts

While the Government's statement of facts is accurate, it does not give the complete factual picture which was before Judge Costantino when the motion to dismiss was made. This litigation has had a most torturous course because of the manner in which the Government proceeded.

In September 1975, appellee Contino was indicted under Indictment No. 75 CR 659. Appellee then moved to dismiss that indictment on grounds of double jeopardy, but while that motion was under advisement, a new superseding indictment was handed down under Indictment No. 75 CR 659(S). The Government then dismissed the prior indictment. The superseding indictment was handed down March 29, 1976, over six months after the original indictment had been filed. At that time appellee Contino joined in the co-defendant Labriola's motion to dismiss the indictment because of the late date of the

superseding indictment. This motion was denied by Judge Costantino, and the case was set down for trial. The record indicates that in fact trial commenced on April 29, 1976, but was thereafter adjourned.

On April 29, 1976 appellee moved under the Interstate Detainer Act, for the dismissal of the indictment. The case was then adjourned for argument on the matter until May 12th. At that time agreement was reached between appellee, the Court and the Government, that further proceedings were to await a decision by the United States Court of Appeals in Mauro. (A.73-77)

At the time that appellee Contino agreed to such an adjournment he acknowledged that he was waiving his speedy trial rights for that limited purpose only, and that he was preserving all of his other rights. At the time of this inquiry counsel for Contino specifically noted that the adjournment was limited both in time and scope, and that Contino "agreed to an adjournment until the Second Circuit reaches that [Mauro] decision."* (A76-77) Neither Contino nor his counsel ever agreed to any further adjournments.

The Government acknowledged the terms of the agreement and agreed that the decision by the Court of

* It is to be noted that the Court of Appeals reached a decision on October 26, 1976.

Appeals in Mauro would guide the disposition of appellee's case. Specifically, counsel for the Government acknowledged that appellee Contino's position was similar to that of Mauro. (A.73) In fact, while discussing the applicability of Mauro to the instant case, the Prosecutor noted that while the co-defendant appellee Labriola's case was "different . . . Mr. Contino's is not." At no time did the Prosecutor for the Government ever advance an argument that appellee Contino should be distinguished from the decision in Mauro, or that the Court should distinguish a decision in Mauro from applicability in appellee's case.

After the decision in Mauro was handed down, the case was ultimately scheduled to be heard in March, 1977. At that time, the Government filed its memorandum in opposition to appellee Contino's motion to dismiss under the Interstate Detainer Act, submitting an extensive brief in support of its legal argument. That brief is set forth in its entirety (A.133-A.157). The sole issue raised by the Government in its brief was whether Mauro should be applied retroactively to the case of appellee. No other legal argument was advanced by the Government in the District Court. It was in this context then that Judge Costantino rendered his decision that is the subject matter of this appeal.

Argument

THE DISTRICT COURT'S DECISION
SHOULD IN ALL RESPECTS BE AFFIRMED

The District Court did not misapprehend the nature of the agreement between the parties, nor did it improperly fail to consider the issues raised by the Government in opposition to appellee Contino's motion to dismiss. In the context of the case, and in view of the legal arguments advanced by the Government, the District Court correctly dismissed the indictment.

The sole argument advanced by the Government in opposition to appellee Contino's motion to dismiss was that United States v. Mauro, 544 F.2d 588 (2d Cir. 1976), should not be applied retroactively to control appellee Contino's case. No other legal argument was raised by the Government, either at the time that it filed its extensive memoranda in opposition to the motion to dismiss (A.133) or at the time that the agreement was reached in May, 1976 to await the United States Court of Appeals decision in Mauro.

The Government's contention that the District Court did not properly reach the merits of the Government's position (see Government Brief, page 13, footnote 16) is simply not in accord with the facts. At the time the original motion to dismiss was made, and the matter adjourned on May 12, 1976 no argument was raised by the Government

that appellee Contino's situation would not be controlled by Mauro. Several times the Government Prosecutor acknowledged that appellee Contino's situation was similar to that of Mauro. The Prosecutor acknowledged that "Mr. Contino's situation could be similar to the two cases before Judge Bartels [Mauro]" (A.71) and that while appellee Labriola's case is "different . . . Mr. Contino's is not." (Id.) In fact, it is clear from a reading of the transcripts that no serious argument was being advanced by the Government that appellee Contino would not come within the factual ambit of Mauro.

When the motion to dismiss was again reargued in 1977, the Government did not offer any legal argument that would distinguish Mauro from appellee Contino's circumstances except for the question of retroactivity. A review of the Government's Brief (A.133) makes abundantly clear that there was no other issue raised by the Government for the District Court to consider, other than an effort to have Mauro restricted on grounds of nonretroactivity. Thus Judge Costantino's finding that the Government conceded that appellee Contino fell within the factual ambit of Mauro is amply supported by the record. (A34) In this context it is submitted that the Government's request for remand to the District Court for "plenary consideration of these issues" (Government Brief, footnote 16 at page 13) is without merit and an effort by the Government to seek to reargue its case on new grounds

not raised below. The Government should not be able to reconstruct its argument at this time by claiming the District Court erred when in fact it was the Government that failed to raise the very issues it now complains of. The District Court properly considered the questions before it, and there is no further reason for reconsideration or remand to the District Court.

In the context of the case as presented to the District Court, Judge Costantino appropriately found that the Government was equitably estopped from asserting the retroactivity argument. It is submitted that the District Court had ample basis for determining that advancing the retroactivity argument at this late stage of the litigation was "unconscionable and would cast grave doubt on the validity of the defendants' waiver of their rights under the Sixth Amendment and the Speedy Trial Act...." (A.35)

Since the retroactivity argument was the sole contention raised by the Government in opposition to appellee Contino's motion to dismiss under the Interstate Detainer Act, there was no further issue for the District Court to consider. The District Court was under no obligation to seek to find alleged factual differences between Mauro and appellee Contino, nor to otherwise consider arguments which the Government had failed to assert. The Government chose to raise its opposition to appellee Contino's motion solely

on grounds of retroactivity and should not now be able to complain that other arguments should be considered.

The Government's other request that this appeal should be held pending a decision by the Supreme Court in Mauro is, we submit, an extraordinary remedy for which no legal support is offered. The Government's effort to contort the agreement reached by appellee Contino so as to extend appellee's waiver of a speedy trial is without support in the record. In view of the Government's position that Mauro should not be applied "retroactively" to appellee Contino or that other legal reason exists for distinguishing appellee's case from that of Mauro, there seems to be no further need for appellee to waive his right to a speedy trial while the appellate processes are being exhausted. If, as appellee contends, Judge Costantino's order was correct, then this Court should affirm and dispose of this matter as justice requires. If the Government desires to pursue this matter in the Supreme Court, that is its prerogative, but it cannot argue that appellee Contino consents to it.

In view of the above, it is submitted that the District Court's determination should be in all respects affirmed.

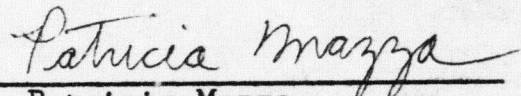
Respectfully submitted,

STEVEN J. HYMAN
Attorney for Appellee
Thomas Contino

CERTIFICATION

The undersigned hereby certifies that on the 31st day of October, 1977 I did mail a copy of Appellee Thomas Contino's brief to the United States Attorney for the Eastern District of New York at 225 Cadman Plaza East, Brooklyn, N.Y. 11201.

Dated: New York, N.Y.
October 31, 1977



Patricia Mazza